1991

State of Utah v. Glenn A. Lemon : Brief of Appellant

Utah Supreme Court

Keith H. Chiara; Attorney at Law; Attorney for Defendant-Appellant.
Paul Van Dam; Attorney General for the State of Utah; Attorney for Plaintiff-Respondent.

IN THE UTAH SUPREME COURT

State of Utah, Plaintiff-Respondent;	)	
vs.	)	Case No. 900474-SC
Glenn A. Lemon, Defendant-Appellant.	)	

APPELLANT'S BRIEF

Appeal from the Seventh Judicial District Court
In and for Emery County
Judge Boyd Bunnell, presiding

Argument Priority (2)
"Appeals from convictions in all other criminal matters"

Attorney for Plaintiff-Respondent:

Paul Van Dam
Attorney General for the State of Utah
Room 236
Utah State Capitol
Salt Lake City, UT 84114

Attorney for Defendant-Appellant:

Keith H. Chiara #0621
Attorney at Law
P. O. Box 955
Price, UT 84501
Telephone: (801) 637-7011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES: Cont.

Authority Cited:.....Where Cited:

Cases:

STATEMENT OF JURISDICTION

This being an appeal from conviction of a first degree felony, inter alia, the Supreme Court is granted original appellate jurisdiction over this case by Section 78-2-2 U.C.A., (1953), as amended, subject to referral to the Court of Appeals.

STATEMENT OF ISSUES

FIRST ISSUE: Whether Defendant was denied the effective assistance of counsel by the Court's allowing Defendant's original counsel to withdraw nineteen (19) days before trial and by the Court's appointment of the public defender to represent Defendant without allowing sufficient time for the public defender to prepare for trial.

Standard of Appellate Review: This issue presents a question of law which is reviewable without deference to the findings or rulings of the trial court. Western Kane Company Special Service District #1 v. Jackson Cattle Company, 744 P.2d 1376.

SECOND ISSUE: Whether the Defendant's trial attorney's acts and omissions fall below the standard of effective assistance of counsel and Defendant was thus denied effective assistance of counsel.

Standard of Appellate Review: This issue presents a question of law, which the Appellate Court should determine witnout giving special weight to findings or rulings in the record. This issue also presents questions of fact, some of which are not found in the trial record, and the Court should determine if the

issue should be remanded to the Trial Court for an evidentiary hearing on this issue. cf. Fernandez v. Cook, 783 P.2d 547 (Utah 1989).

THIRD ISSUE: Whether the failure of the court to sever Count V of the Information, POSSESSION OF A FIREARM BY A RESTRICTED PERSON, which requires proof of the Defendant's prior felony convictions, constitutes reversible error.

Standard of Appellate Review: This matter was not ruled upon in the Trial Court, but the Trial Court should have taken it upon itself to sever this count. The Court's failure constitutes manifest error, and this Court should review the record and make its determination as to whether this error is so prejudicial that the Defendant is entitled to reversal as a matter of law. State v. Cobo, 60 P.2d 952, 958 (1936). (See Justice Stewart's Dissent, State v. Bullock, 119 Utah Adv. Rep. 33, 38). The question is one of law, whether Rule 9 (d) U.R.Cr.P. requires the Trial Court to sever even though no motion is made by counsel, and is subject to determination by this Court on the basis of the record alone.

FOURTH ISSUE: Did the Trial Court err in allowing the jury to consider constructive possession, as opposed to actual possession of a firearm, as an aggravating element in the crime of Aggravated Burglary?

Standard of Appellate Review: This issue requires an inter-

pretation of Section 76-6-203, U.C.A., (1953), as amended, and is therefore reviewable without deference to the trial court's rulings. State v. Chindgren, 777 P.2d 527.

FIFTH ISSUE: Was the Defendant denied a fair trial by the misconduct of the prosecutor?

Standard of Appellate Review: Defendant asserts that the prosecutor's improper introduction of exhibits and misrepresentation of the evidence to the jury on closing argument had a prejudicial effect on the jury. This issue presents a question of law and the Appellate Court should determine the issue from the record since no findings of fact were entered by a trial court.

SIXTH ISSUE: Was Defendant/Appellant denied a fair trial by the Prosecutor's improper introduction of exhibits, purported to be "burglary tools" and the Trial Court's error in admitting such exhibits into evidence and placing them before the jury over defense counsel's objection?

Standard of Appellate Review: The Trial Court's ruling on admissibility of evidence should be upheld unless it is clearly erroneous.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

Amendments to the Constitution of the United States

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself. nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Constitution of Utah, Article I, Section 7

No person shall be deprived of life, liberty or property, without due process of law.

Constitution of Utah, Article I, Section 12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Utah Code Annotated (1953), Section 76-1-401

In this part unless the context requires a different definition, "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

Nothing in this part shall be construed to limit or modify the effect of Section 77-21-31 in controlling the joinder of offenses and defendants in criminal proceedings.

Utah Code Annotated (1953), Section 76-2-202

Every person, acting with the mental state required for the

commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

Utah Code Annotated (1953), Section 76-6-203

(1) A person is guilty of aggravated burglary if in attempting, committing, or fleeing from a burglary, the actor or another participant in the crime:

(a) causes bodily injury to any person who is not a participant in the crime;

(b) uses or threatens the immediate use of a dangerous weapon against any person who is not a participant in the crime; or

(c) possesses or attempts to use any explosive or dangerous weapon.

(2) Aggravated burglary is a first degree felony.

(3) As used in this section, "dangerous weapon" has the same definition as under Section 76-1-601.

Utah Code Annotated (1953), Section 77-14-2

(1) A defendant, whether or not written demand has been made, who intends to offer evidence of an alibi shall, not less than ten (10) days before trial, or at such other time as the court may allow, file and serve on the prosecuting attorney a notice, in writing, of his intention to claim alibi. The notice

shall contain specific information as to the place where the defendant claims to have been at the time of the alleged offense and, as particularly as is known to the defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish alibi. The prosecuting attorney, not more than five (5) days after receipt of the list provided herein or at such other time as the court may direct, shall file and serve the defendant with the addresses, as particularly as are known to him of the witnesses the state proposes to offer to contradict or impeach the defendant's alibi evidence.

(2) The defendant and prosecuting attorney shall be under a continuing duty to disclose the names and addresses or additional witnesses which come to the attention of either party after filing their alibi witness lists.

(3) If a defendant or prosecuting attorney fails to comply with the requirements of this section, the court may exclude evidence offered to establish or rebut alibi. However, the defendant may always testify on his own behalf concerning alibi.

(4) The court may, for good cause shown, waive the requirements of this section.

Utah Rules of Civil Procedure, Rule 9

(a) Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged arise out of a criminal episode as defined in section 76-1-401, U.C.A., (1953), as amended. A felony offense

and a misdemeanor offense may be charged in the same indictment of information if:

(1) they arise out of a criminal episode, and

(2) the defendant is afforded a preliminary hearing with respect to the misdemeanor along with the felony offense.

(b) Two or more defendants may be charged in the same indictment of information if they are alleged to have participated in the same act or conduct or in the same criminal episode.

Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

When two or more defendants are jointly charged with any offense, they shall be tried jointly unless the court in its discretion, on motion or otherwise, orders separate trials consistent with the interests of justice.

(c) The court may order two or more indictments or informations or both, to be tried together if the offenses and the defendants, if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

(d) If it appears that a defendant or the prosecution is prejudiced by a joinder of offenses or defendants, in an indict-

ment or information, or by a joinder for trial together, the court shall order an election of separate trials of separate counts, or grant a severance of defendants, or provide such other relief as justice requires.

A defendant's right to severance of offenses or defendants is waived if the motion is not made at least five (5) days before trial. In ruling on a motion by defendant for severance, the court may order the prosecutor to disclose any statements made by the defendant which he intends to introduce in evidence at the trial.

Utah Rules of Criminal Procedure, Rule 12

(a) An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court otherwise permits. It shall state with particularity the grounds upon which it is made and shall set forth the relief sought. It may be supported by affidavit or by evidence.

(b) Any defense, objection or request, including request for rulings on the admissibility of evidence, which is capable of determination without the trial of the general issue, may be raised prior to trial by written motion. The following shall be raised at least five (5) days prior to the trial:

(1) defenses and objections based on defects in the indictment or information other than that it fails to show

jurisdiction in the court or to charge an offense, which objection shall be noticed by the court at any time during the pendency of the proceeding;

(2) motions concerning the admissibility of evidence;

(3) requests for discovery where allowed;

(4) requests for severance of charges or defendants under Rule 9; or

(5) motions to dismiss on the ground of double jeopardy . . . c, d, e, f, g (2) (3) (4).

Rules of Judicial Administration 1988, Rule 4-604

Intent:

To establish a uniform procedure for withdrawal of counsel in criminal cases.

Applicability:

This rule shall apply to all trial courts of record and not of record.

Statement of the Rule:

(1) An attorney may withdraw as counsel of record in all cases except where withdrawal may result in a delay of the trial or prejudice to the client. In those cases, an attorney may not withdraw without the approval of the court.

(2) A motion to withdraw as an attorney in a criminal case shall be made in open court with the defendant present unless otherwise ordered by the court.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

The Defendant, along with the Co-Defendant, was tried on four (4) counts of Aggravated Burglary, Possession of a Dangerous Weapon by an Unauthorized Person, Possession of an Instrument for Burglary or Theft and four (4) counts of Theft. The two Defendants were also charged with being Habitual Criminals, although after the jury returned its verdict on those charges that went to the jury, the prosecutor elected to not proceed with the prosecution of being an Habitual Criminal.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN TRIAL COURT

The criminal violations are alleged to have occurred on June 2, 1989, in Emery County, Utah. The Defendants were arrested and placed in the Emery County Jail on that day, and an Information, charging the Defendants with ten (10) criminal counts was filed on June 8, 1989.

The Defendants were unable to post bail, and on June 29, 1989, Preliminary Hearing was held on an amended Information containing ten (10) criminal counts and an eleventh (11th) count of being an Habitual Criminal. Defendants were represented by their private attorney, and the Court, on June 30, 1989, issued a memorandum decision binding all counts over to the District Court for Emery County, State of Utah, for further proceedings. On July 6, 1989, the Defendants were arraigned in District Court and

entered "Not Guilty" pleas. Trial was set for September 25 and 26, 1989.

On August 17, 1989, the attorney for the Defendants filed a Motion to Withdraw, along with a Motion for the matter to be set for hearing on September 6, 1989. On September 6, 1989, the Defendants and their counsel appeared before the Seventh Judicial District Court for a hearing on counsel's Motion to Withdraw. The Court issued an order granting counsel's Motion to Withdraw and appointed the Public Defender for Emery County to represent the Defendants in the September 25 and 26, 1989 trial.

On September 21, 1989, four (4) days before trial, the recently appointed counsel for Defendants filed a Motion and Affidavit in support thereof, to vacate the trial setting of September 25 and 26, 1989, on the grounds that he had just learned of the existence of possible alibi witnesses and needed additional time to locate them and give the statutory notice of an alibi defense. The Court denied this motion.

Trial was held on September 25 and 26, 1989. The Defendant/Appellant was found guilty of nine (9) counts, and after the jury returned its verdicts, the prosecutor elected not to proceed with the Habitual Criminal charge. The Court then sentenced Defendant to be imprisoned in the Utah State Prison.

RELEVANT FACTS

At 4:08 a.m. on June 2, 1989, Deputy Sheriff, Laury Hansen, was patrolling Emery County on Utah Highway 10, when the alarm

system in Ferron Drug Store went off and was received over Deputy Hansen's radio frequency. (Trial Transcript, pgs. 62-63). Deputy Hansen immediately proceeded south toward the town of Ferron, while at the same time Deputy Robert Blackburn was called from his home in Ferron to respond to the same call. (T. 52-53). As Deputy Blackburn proceeded north on Highway U-10 in the direction of Ferron Drug Store, according to his trial testimony, he saw the glare of headlights coming in his direction traveling form north to south. (T. 53-54). He saw an orange and white Scout International with Colorado plates speeding through the darkness past him. (T. 55). He testified that he had to slow down in order to get a description of the vehicle and that it was traveling at a faster-than-normal speed. (T. 54). He testified that he passed the vehicle at approximately 4:14 a.m. His first observation of the venicle was only to see the glare of its lights as it traveled south in his direction, and although when he first observed it, the vehicle was in the north part of Ferron, where Ferron Drug Store is located, he did not actually see the vehicle stopped at Ferron Drug Store or at any other location along Highway U-10. (T. 53-55).

Although Deputy Blackburn's testimony was that his initial reaction was to stop the vehicle, he proceeded to Ferron Drug Store where he spent the next nine (9) minutes checking the property. (T. 55-56). It was only after those nine (9) minutes

elapsed, that he and Deputy Hansen, who had then arrived on the scene, put out a call to Deputy Sheriff J.D. Mangum, who was at his home in the town of Emery, located fifteen (15) miles south of Ferron. (T. 66-67).

Deputy Mangum testified he stopped Co-Defendant Seel's vehicle at 4:27 a.m. at Mile Post 14.3 (sic), eight (8) miles north of Emery. (T. 66-67). Deputy Hansen testified that when he arrived at the scene of the stop, that the vehicle was stopped two (2) miles north of the town of Emery. (T. 64). Deputy Mangum stopped the first vehicle he encountered, as it was approaching him, and that vehicle turned out to match the description of an orange and white Scout International that Deputy Blackburn claimed he had seen leaving the town of Ferron at a higher-than-normal rate of speed thirteen (13) minutes earlier. If Deputy Mangum's testimony is correct, and he did stop the Co-Defendant eight (8) miles north of the town of Emery, Co-Defendant's average rate of speed would have been 32.3 miles per hour over the course of the seven (7) miles traveled.

When Deputy Mangum approached the stopped vehicle, Co-Defendant/Appellant Seel attempted to exit the vehicle to walk back to Deputy Mangum, but according to Deputy Mangum's testimony, he told the Co-Defendant to remain in the vehicle. (T. 67-68). Through the predawn darkness, Deputy Mangum claimed in this testimony, that he was able to observe many items in the vehicle that appeared "new" to him. (T. 68). There is no testimony as

to whether he used the assistance of artificial light in looking into the interior of the vehicle, but at the hour of 4:27 a.m., it appears reasonable that the items in the vehicle were not in plain view and Deputy Mangum needed the use of artificial light in order to begin a visual search of the vehicle.

Upon Deputy Hansen's arrival, he and Deputy Mangum placed the two occupants of the vehicle under arrest and secured the vehicle. (T. 74). The vehicle was then towed to the town of Ferron, where a more thorough search was conducted and photographs were taken of the interior of the vehicle. (T. 71-73). Exhibit 1-A is a photograph taken at approximately 6:00 a.m. on June 2nd, and is a picture taken of the interior of the vehicle with the passenger door open. (T. 72 and 76-77). Later that day, after further examination of the vehicle, the Emery County Sheriff's Department obtained a search warrant to search the vehicle. The search warrant authorized law enforcement officers to search the vehicle, but did not authorize them to search the briefcase found within the vehicle. That briefcase was nevertheless opened and found to contain a loaded firearm. (T. 70-71). Subsequently, both occupants were charged with four (4) counts of Aggravated Burglary, four (4) counts of Theft, one (1) count of Possession of a Dangerous Weapon by a Restricted Person, and one (1) count of Possession of Burglary Tools. Just prior to the Preliminary Hearing, the State filed an amended Information in

which an additional count of Being an Habitual Criminal was added.

The Defendants retained the legal services of Mark H. Tanner, Attorney at Law, with offices in Castle Dale, Utah. Mr. Tanner represented the Defendants in the Preliminary Hearing and then on August 17, 1989, filed a Motion to Withdraw as Counsel for the Defendants. That Motion was heard on September 6, 1989, nineteen (19) days before trial, and Judge Boyd Bunnell, Seventh Judicial District Court Judge, granted Mr. Tanner's Motion to Withdraw.

On that same day, Judge Bunnell then appointed Allen Thorpe, the Emery County Defender, to represent both Defendants in the trial which was set for September 25-26, 1989. Mr Thorpe did not understand the complexity of the case, nor was he aware of the extent of the charges against the Defendants. Although he already had two (2) jury trials scheduled between September 6th and September 25th, 1989, he assumed that he would be able to prepare for all of them. The first jury trial scheduled for Mr. Thorpe after September 6th did not go to trial because the defendant agreed to enter a plea just prior to the beginning of the trial. Following the second trial scheduled for Mr. Thorpe during that period, Mr. Thorpe visited the Defendants for the first time on the afternoon of September 20, 1989, a Wednesday. It was only then that he discovered what defenses the Defendants had and became aware of the problems inherent in defending the

case. (See Affidavit in Support of Motion to Vacate).

On September 21, 1989, Mr. Thorpe filed a Motion to Vacate and supported that Motion with an Affidavit. In the Affidavit, Mr. Thorpe informed the Court that he had not met with the Defendants until September 20th and would not be able to adequately prepare their defense in the time remaining before the coming trial, scheduled for Monday, September 25th. Judge Bunnell denied the Motion and the trial proceeded as scheduled.

On the first day of trial, Defendants' counsel filed a Notice of Alibi Defense in behalf of the Defendants, and was not precluded from presenting an alibi defense. However, because Mr. Thorpe did not even meet with the Defendants until approximately three (3) working days before trial, Mr. Thorpe was unable to locate or contact the persons the Defendants claimed would be able to establish an alibi for them and so they were unable to raise the alibi defense without taking the witness stand themselves. Neither were they able to present corroborating witnesses in support of their claim that they were in Price, Utah, approximately forty (40) miles from Ferron, at 3:00 a.m., June 2, 1989. (T. 173). That evidence would have established an alibi for the Defendants because Deputy Sheriff Kyle Ekker, a detective for the Emery County Sheriff's Office, testified that his investigation of the burglary showed that the burglary of Jeanie's Convenience Store and Gas Station located in Ferron, had occurred

no later than 3:16 a.m. on June 2nd. (T. 99).

The State began its case with an opening statement, followed by calling various deputy sheriffs as witnesses. After the State's fourth witness had completed direct and cross-examination, and had been allowed to step down, counsel for the Defendants realized that the State's witnesses were conferring with each other concerning the testimony being presented before the Court and moved the Court to have all further potential witnesses excluded from the courtroom. (T. 81). Following the exclusion of the witnesses, the State then called two more deputy sheriffs to testify and then called as witnesses, the four proprietors of the four businesses that had been burglarized. Then the State rested its case. (T. 152).

After the State rested, counsel for the Defendants moved the Court to dismiss the four (4) burglary counts or reduce them to Third Degree Felonies for Burglary of Non-Dwellings, arguing that there was no showing that the Defendants were armed with a deadly weapon or attempted to use a deadly weapon in attempting, committing or fleeing from the burglaries. (T. 153). He also moved to dismiss Count V as to Defendant Lemon, arguing that both Defendants could not be charged with possession of the firearm because it did not belong to both of them and moved to reduce the level of three (3) of the theft counts because the values of the property stolen had not established the level of the crimes charged. (T. 153-154).

The Court did not grant Defendant's motion regarding the four (4) Aggravated Burglary counts, but did dismiss the charge of Possession of a Dangerous Weapon by an unauthorized person as to each Defendant. (T. 161). Then the Court, on its own motion, dismissed Count VI, which charged the Defendants with Possession of an Instrument of Burglary or Theft, finding that the State had failed to show that any of the exhibits introduced as being burglary tools are commonly used in the burglary business. (T. 161-162). Interestingly, when Mr. Thorpe had earlier objected to the State's so called "burglary tools" being admitted into evidence, the Court overruled Mr. Thorpe's objection and admitted the tools into evidence, allowing them to be placed before the jury during the presentation of the remainder of the State's case. (T. 103-106). Mr. Thorpe's objection to the admission of those tools as evidence of possession of burglary tools was based upon the same argument the judge adopted in dismissing Count VI. Subsequently, when the prosecutor was making his closing arguments, even though Count VI was dismissed, the prosecutor brought the allegation of the burglary tools before the jury, telling them that "there were burglary tools in the Scout." (T. 213, Line 24).

After the Court had ruled on Mr. Thorpe's motions, the prosecutor asked to be allowed to respond to the Court's rulings. He first argued that he presented sufficient evidence to show

that the tools in the possession of the Defendants were burglary tools, but the Court was not persuaded by his arguments and let its ruling stand. (T. 162-164).

The prosecutor then asked the Court to allow the State to reopen with respect to the Defendants' knowledge of the weapon being in the briefcase. (T. 164). The Court then allowed the State to reopen, and introduce new evidence, not alluded to in its case in chief, that Defendant/Appellant Seel knew that the weapon was in the briefcase. (T. 166). After the State again rested, counsel for the Defendants then called Defendant/Appellant Seel to testify. (T. 170). (Defendant Lemon elected not to take the witness stand and testify). Following completion of Defendant Seel's testimony, the Court adjourned for the day, excused the jury and then, out of the jury's presence, ruled that Count V, previously dismissed as to both Defendants, was then dismissed only as it applied to Mr. Lemon, but reinstituted the Count as it applied to Defendant/Appellant Seel. (T. 183).

At the completion of the presentation of all evidence, the jury returned verdicts of guilty on all nine (9) remaining counts against the Defendant. The Court then asked the prosecutor if the State wanted to proceed on the further allegation of Being an Habitual Criminal, and the prosecutor informed the Court that the State did not wish to proceed with that Count. Defendant Lemon was subsequently sentenced to be imprisoned in the Utah State Prison.

SUMMARY OF THE ARGUMENT

FIRST ISSUE: The Defendant was denied effective assistance of counsel when the trial judge allowed Defendant's private attorney to withdraw nineteen (19) days before trial and appointed the public defender to represent Defendants without vacating the trial date and resetting the matter for a later date. The Court's own calendar showed that the public defender already had two (2) District Court jury trials scheduled during that nineteen (19) day period and certainly could have assumed that defense counsel had other court settings and obligations scheduled, as well. The public defender did not have the benefit of sitting through the Preliminary Hearing and knew nothing of a case including ten (10) criminal counts and requiring two (2) days of trial. Defense Counsel filed a Motion to Vacate Trial on September 21, 1989, and that Motion was improperly denied by the Court.

SECOND ISSUE: Neither Defendant was able to post bail and both were held in the Emery County Jail until trial. They were unable to visit the public defender and he did not visit or talk with either Defendant until the afternoon of September 20, 1989, leaving three (3) working days before trial. It was too late by then, for defense counsel to file Motions to Suppress the evidence and to sever Count V and to serve notice of the alibi defense. More importantly, defense counsel did not have enough time to locate, interview and subpoena the Defendants' alibi

witnesses. Defense counsel failed to move to vacate in a timely manner and failed to locate, interview and subpoena alibi witnesses prior to trial.

At trial, defense counsel failed to object to the reading of the criminal records of the Defendants, failed to exclude witnesses at the beginning of trial, and failed to object to the prosecutor's misstatements of evidence to the jury during closing argument.

THIRD ISSUE: Count V of the Information, POSSESSION OF A DANGEROUS WEAPON BY A RESTRICTED PERSON, was improperly joined with the other counts in the Information, because it was not incident to the single criminal episode of the other counts as required by Section 76-1-401, U.C.A., (1953), as amended, and did not arise out of a single criminal episode. Evidence to support the count would have been inadmissible and prejudicial and the jury would not have been made aware that Defendant had a prior criminal history.

The Court, pursuant to Rule 9 (d) U.R.Cr.P., should have severed Count V without a motion from Defendants to do so, and the Court's failure to sever, denied Defendants their right to due process of law.

The Court ruled that there wasn't any evidence that Defendant Lemon had any knowledge of the presence of a firearm in the vehicle and dismissed Count V, as to him. Because Defendant Lemon did not know of the existence of a firearm, it was impossi-

ble for him to have the necessary "mental state" required by Section 76-2-202, U.C.A., (1953), as amended, to be an accomplice to the aggravated aspect of Counts I-IV.

FOURTH ISSUE: Constructive possession of a firearm is not an aggravating element in the crime of aggravated robbery. If it were, general use of the word "possession" could even be used to include weapons that are not in the immediate presence of the Defendant. Section 76-6-203, U.C.A., (1953), as amended, denotes "use" of a weapon in some manner while committing or fleeing from a burglary, such as "uses", "threatens" or "attempts to use". The word "possesses", preceded and followed by the disjunctive "or" indicates legislative intent that the word "possesses" be of equal gravity with the words and phrases "uses", "threatens", "attempts to use", and does not include circumstances where a weapon is never even held by a defendant and plays no part in the defendant's activities in attempting, committing or fleeing from a burglary.

FIFTH ISSUE: The prosecutor argued facts not in evidence, told the jury the Defendants possessed "burglary tools", even though Count VI was dismissed by the Court after the State rested, and misstated the testimony of some witnesses. Although defense counsel did not make any objections, the prosecutor's statements may have prejudiced the jury and it was manifest or plain error for the Court to fail to correct the prosecutor and

admonish the jury to disregard the prosecutor's improper statements.

SIXTH ISSUE: The Court erred in admitting Exhibits 11-19 as burglary tools over defense counsel's objection. The prosecutor failed to lay a proper foundation for the admission of the exhibits into evidence as burglary tools or as evidence of their use in the burglaries charged in the Information. After the tools were placed in view of the jury as "burglary tools", and after the State rested, the Court, upon its own motion, dismissed Count VI, POSSESSION OF AN INSTRUMENT FOR BURGLARY OR THEFT, stating that the State had not presented any evidence to support Count VI. No evidence having been presented to support Count VI, the Court erred in admitting Exhibits 11-19, and prejudiced the jury in so doing.

DETAIL OF THE ARGUMENT

FIRST ISSUE: In the Utah Code of Judicial Administration, Rule 4-604 governs withdrawal of counsel in criminal cases. That rule provides that an attorney may not withdraw without the approval of the Court and must make his motion to withdraw in open court with the defendant present. Even then, he may not withdraw if his withdrawal will result in a delay of the trial or prejudice to the client. It would seem that it is within the sound discretion of the court to decide whether counsel should be allowed to withdraw or not. The Court's decision generally is not disturbed absent showing that it is clearly erroneous.

In the present case, Defendant and the Co-Defendant retained private counsel to represent them. That Counsel was present at the Preliminary Hearing and at the Arraignment in the District Court where the Defendants entered "Not Guilty" pleas and trial was set for September 25-26, 1989. Approximately six (6) weeks after arraignment, counsel for the Defendants filed a Motion to Withdraw and during the Court's regularly scheduled Law and Motion Calendar day on September 6, 1939, the Court heard counsel's motion and allowed counsel to withdraw, knowing that the case contained four (4) First Degree Felony charges and several other felony and misdemeanor charges and included an Habitual Criminal count. After allowing the private counsel to withdraw, the Court appointed the public defender, even though

the Court was aware or should have been aware that the public defender had two (2) felony jury trials scheduled between the date of appointment and the date of the trial in this matter. (See Appendix). The Court's calendar was before it and the Court should have also been sensitive to the probability that the public defender had other court settings and obligations scheduled during that period, as well.

The public defender completed a District Court jury trial on September 19, 1989, and then, on September 20, 1989, he visited Defendant/Appellant and the Co-Defendant for the first time. It was immediately apparent to him that he was going to be unable to provide effective assistance of counsel to the Defendants if the trial was held as scheduled. On September 21, 1989, the public defender filed a Motion to Vacate and an Affidavit in Support of that motion. In the Affidavit, the public defender stated that he had met with the Defendants on September 20, 1989 and only then discovered they had an alibi defense that needed to be prepared for. (See Affidavit in the Appendix). By then, it was already to late for him to comply with the statutory time limits for filing a Motion to Suppress Evidence (See Rule 12, U.R.Cr.P.), or to file a Motion to Sever (See Rule 9, U.R.Cr.P.), and was unable to give notice to the State of an alibi defense as required by Section 77-14-2 U.C.A., (1953), as amended. It was apparent from the information contained in the public defender's Affidavit in Support of his Motion to Vacate, that Defendants

were going to be denied effective assistance of counsel. The Court ruled on the motion on the morning of the trial and improperly denied the motion. Defendant/Appellant Lemon was denied his right to effective assistance of counsel in his defense, as guaranteed by Amendment VI of the Constitution of the United States and as guaranteed by the Constitution of Utah, Article I, Section 12.

SECOND ISSUE: In addition to being denied effective assistance of counsel as a result of the Court's failure to see that Defendant Lemon was not prejudiced by the withdrawal of his private counsel, or prejudiced by the failure of the Court to give newly appointed counsel sufficient time to adequately prepare the defense, Defendant Lemon was denied the effective assistance of counsel because of the failures of the public defender to prepare in a timely manner. A defendant who contends that he was not afforded effective assistance of counsel, has the burden to persuade the Court that counsel failed in some manner to represent his interests, resulting in prejudice to his defense. State v. Forsythe, 560 P.2d 337 (Utah 1977). Because neither Defendant's private counsel nor the public defender filed any motions to suppress evidence in the case, Defendant/Appellant Lemon may claim that such failure denied him adequate and effective assistance of counsel prior to trial. Rule 12, U.R.Cr.P. (b) (2) requires that a Motion to Suppress Evidence must be

raised, in writing, at least five (5) days prior to trial. No such motion was ever filed in Defendant's behalf, even though trial testimony shows that the only witness to see a vehicle in the vicinity of Ferron, Utah, that matched the description of Defendant Seel's vehicle, Deputy Blackburn, did not see Defendant Seel's vehicle stopped at the location of any of the burglaries. At the time Deputy Blackburn observed the vehicle, he did not have any evidence tying that vehicle to the as yet uninvestigated burglaries, and did not have probable cause to stop it. When the call was sent to Deputy Mangum to instruct him to stop the vehicle, there is nothing to show that he was told anything other than to stop the vehicle, and stopped it without probable cause to believe that the occupants had committed any criminal offense. Subsequent stopping, warrantless arrest and warrantless search of the vehicle raises a legitimate argument that the Defendants had legitimate grounds for a Motion to Suppress any evidence found as a result of the stopping, arrest and search of Defendant Seel's vehicle. Whiteley v. Warden of Wyoming Penitentiary, 401 U.S. 560, 91S Ct 1031, 28L Eb 2d 301, (1971). The fact that Deputy Mangum stopped the Defendants on a rural highway at 4:27 a.m., also raises the question of whether anything within the vehicle was in plain view and whether Deputy Mangum needed the use of an artificial light in order to view the interior of the vehicle. Additionally, Deputy Mangum testified at trial that Exhibit 1-A, a photograph of the interior of the vehicle, taken with the

passenger door open, was taken at approximately 6:00 a.m. on June 2, 1989. That photograph was taken prior to the issuance of any search warrant and prior to the obtaining of any consent to search, and thus could be viewed as a further illegal search of Defendant Seel's vehicle. State v. Schlosser, 108 Utah Adv. Rep. 38, 774 P.2d 1132, (Utah 1989), State v. Terechek, 702 P.2d 1131 (Or. App. 1985).

Defendant was also entitled to a Motion to Sever Count V, POSSESSION OF A DANGEROUS WEAPON BY A RESTRICTED PERSON, but because the public defender did not visit Defendant until there were less than three (3) working days left before the trial, it was too late for the filing of such Motion to Sever. Rule 9, U.R.Cr.P., provides that a Motion to Sever must be filed at least "five (5) days before trial" or the Defendant's right to severance offenses is waived. Counsel's failure to timely file the Motion to Sever, denied Defendant his right to due process of law without a knowing waiver on his part. The evidence necessary to prove Count V obviously would have a prejudicial effect on the jury's attitude concerning the Defendant's guilt or innocence on the other counts contained within the Information.

In State v. Carter, 776 P.2d 886, 893 (Utah 1989), the Utah Supreme Court adopted the United States Supreme Court standard in determining ineffectiveness of counsel. "To establish ineffectiveness of counsel under the U.S. Supreme Court standard, a

defendant must show, first, that his or her counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment, and that counsel's performance prejudiced the defendant." The duty of the public defender to file Motions to Suppress and Sever are actions that effective counsel would perform and provide an objective standard by which to measure Defendant/Appellant's counsel because there is evidence on the trial record that legitimately can support the argument that the Defendant may have prevailed on a Motion to Suppress the evidence found in the search and would have prevailed on a Motion to Sever Count V of the State's Complaint. Counsel's failure to timely file those motions and present them before the Court prejudiced the Defendant.

Section 77-14-2, U.C.A., (1953), as amended, requires that when a defendant intends to offer evidence of an alibi, not less than ten (10) days before trial, he shall "file and serve on the prosecuting attorney a notice, in writing, of his intention to claim alibi." Because the public defender did not even talk to the Defendants until less than three (3) working days before trial, it was too late for him to file a Notice of Alibi with the prosecuting attorney. As damaging was the fact that the public defender also did not have time to locate, contact, interview and subpoena those alibi witnesses so that he could have them available to testify at trial. Had they appeared at trial, and testi-

fied that the Defendant and Co-Defendant were in Price, Utah, on June 2, 1989, at approximately 3:00 a.m., (T. 173), their testimony would have rebutted the allegation of the State that these two Defendants were committing a burglary at Jeanie's Convenience Store and Gas Station at 3:16 a.m. on June 2, 1989, (T. 99). Evidence could have then been introduced to show that the distance between Price, Utah, and Ferron, Utah, is approximately forty (40) miles and Defendants would have had to have traveled at a speed greater than 120 miles per hour to reach Ferron in time to burglarize Jeanie's. If defense counsel had provided those alibi witnesses, Defendant/Appellant Seel would not have felt the necessity to testify in his own defense and, coupled with a pretrial order by the Court severing Count V, the jury would have never been prejudiced by hearing of either Defendant's prior criminal history.

Section 78-7-4, U.C.A., (1953), as amended, provides a mechanism whereby the defendant may have all potential witnesses for the State excluded from the courtroom, except when they are testifying, and attorneys representing criminal defendants have a duty to exclude the State's witnesses to prevent them from hearing each other's testimony and possibly adjusting their own testimony so it will conform with the testimony of those who have testified before them. It is also advisable for defense counsel to exclude witnesses so that State's witnesses can not modify

their testimony after taking into consideration the weaknesses in the State's case or the obvious direction of defense counsel's questions.

After four (4) of the State's witnesses had been called and had testified on direct and cross-examination, counsel for the Defendants first realized that the State's witnesses were communicating with each other concerning the case before the Court. It was only then that defense counsel requested that the Court exclude any further potential witnesses from the courtroom, noting that it appeared to defense counsel that "there's quite a bit of consultation going on here" (P. 81, Line 20-23). Counsel's failure to exclude witnesses provided those witnesses with an excellent opportunity to conform their testimony with the testimony of previous witnesses and who possibly modified their testimony in response to defense counsel's questions to previous witnesses and the implied direction of Defendant's defense that defense counsel's questions pointed to.

Finally, Defendant Lemon was denied effective assistance of counsel in those instances when defense counsel failed to timely object to improper statements made by the prosecutor during his closing arguments and failure to request that the Court instruct the jury concerning the prosecutor's improper statements. During the closing arguments, the prosecutor in referring to the existence of the firearm, told the jury that, "we could have had a dead officer or anything else", (T. 212), when there was no

evidence submitted in the course of the trial to support such a claim. In fact, the trial testimony was that, even though the Defendants had the briefcase within their reach, neither one of them ever reached for it nor was the evidence conclusive that either of them even knew that the weapon was in the briefcase at the time. Deputy Mangum's testimony was that after he stopped the vehicle, Defendant/Appellant Seel started to exit the vehicle and Deputy Mangum asked him to remain in the vehicle. Deputy Mangum then went on to testify that as he approached the vehicle, he looked to make sure there were no visible weapons and that he was not in any immediate danger. He then went on to testify that he left the two Defendants in their vehicle for several minutes, while he waited for Deputy Hansen to arrive and there is no evidence that either Defendant handled that briefcase or made any attempt to remove the firearm from it, although they had an excellent opportunity to do so at that time. (T. 68) (T. 74). There is no evidence that Defendant Lemon even knew that firearm was in the vehicle (T. 161, Line 8-11). Defense counsel did not lodge any objection nor ask for any cautionary instruction from the Court. Next, even though the Court had previously dismissed Count VI, POSSESSION OF AN INSTRUMENT USED FOR BURGLARY OR THEFT, (T. 161-164), during the prosecutor's closing arguments, he made reference to the existence to burglary tools in the Scout (T. 213). Again, defense counsel failed to object or ask for a

cautionary instruction to the jury. Although the State failed to produce evidence that the tools caused the damage to the various entryways of the various buildings that had been entered, and the State's witness acknowledged on cross-examination, that no forensic tests had been made to establish the fact that those tools were consistent with the damage done, (T. 97) (T. 114-115), the prosecutor argued to the jury that the tools found in Defendant Seel's vehicle were consistent with the damage that was done to the entryways, (T. 214), but no objection was made by defense counsel. During Deputy Blackburn's testimony, (T. 53), the Deputy testified that he saw the glare of headlights as he turned north on Highway 10 and that as he proceeded north they were coming towards him (T. 54). However, in closing arguments, the prosecutor misstated Deputy Blackburn's testimony as being that the Deputy "saw the lights at the store pointing east before it turned south on State Street and headed south on State Road 10." (T. 216). The implication of such argument is that Defendant Seel's vehicle was parked by the side of the Ferron Drug Store, rather than traveling down the main north-south highway through the middle of town. Again defense counsel did not object. After defense counsel's closing arguments, the prosecutor again took the floor, and argued to the jury that the Defendant was not being truthful, citing facts not in evidence. (T. 226-227). Then again, during the prosecutor's second argument before the jury, he again misrepresented Deputy Blackburn's testimony where

he first saw the headlights when he turned north on Highway U-10, (T. 228), and then argued that the vehicle was stationary. (T. 229). He then told the jury that Defendant/Appellant Seel's vehicle "pulls to the right and heads down Main Street." (T. 229). During the entire course of the prosecutor's arguments, defense counsel failed to object to any of the improper statements made by the prosecutor and his failure to do so denied Defendant/Appellant the effective assistance of counsel.

THIRD ISSUE: Rule 9, U.R.Cr.P. (d), provides that in those cases where the defendant may be prejudiced by joinder of offenses, "the court shall order an election of separate trials of separate counts, or grant the severance of defendants, or provide such other relief as justice requires." Count V of the State's Information, alleging POSSESSION OF A DANGEROUS WEAPON BY A RESTRICTED PERSON, was not part of the same criminal episode as the other charges contained in the Information and additionally, would be prejudicial to the Defendant in any event because, the evidence to support such an allegation includes proof that the Defendant has previously been convicted of a felony. If such information is presented to a jury, it almost certainly would have the effect of causing the jury to believe it is more likely than not that the Defendant, having previously committed a felony, also committed the offenses with which he is charged in the instant Information. Although defense counsel failed to timely

file a Motion to Sever as has been discussed above, and under the general rule failed to preserve this issue for appeal, this is a plain or manifest error appearing on the fact of the record and to the manifest prejudice of the accused and the Court should consider this issue even though defense counsel failed to object before or during trial. State v. Cobo, and State v. Bullock, supra. The Court's failure to sever, on its own motion, denied Defendant/Appellant his right to due process of law and his right to be tried before an impartial jury. The standard in determining the error of the court is reversible error, is whether there is a reasonable probability that, the result with severance would be different, State v. Howitt, 140 Utah Adv. Rep. 6 (Utah App. 1990). Certainly, taken together with the argument that a proper defense would have included Defendants' alibi defense and the severance of Count V precluding the prosecution from introducing evidence of Defendants' prior criminal history, Defendants' case would have been sufficient without the necessity of either Defendant taking the stand to testify in his own behalf to reach a result other than the one arrived by the jury.

FOURTH ISSUE: The Court concluded that constructive possession of the firearm was sufficient to show "possession" under the meaning of Section 76-6-203, U.C.A., (1953), as amended. However, the Court erred by misinterpreting the construction of the statute and attaching a meaning to the word "possesses" that was not intended by the legislature. Section 76-6-203, U.C.A.,

(1953), as amended, denotes use of a weapon in some manner while committing or fleeing from a burglary, such as "uses", "threatens", or "attempts to use." The word "possesses", preceded and followed by the disjunctive "or", indicates legislative intent that the word "possesses" be of equal gravity with the words and phrases "uses", "threatens", or "attempts to use", and does not include circumstances where the weapon was never even held by the Defendant and plays no part in the Defendant's activities in attempting, committing or fleeing from a burglary. In State of Utah, In the Interest of J.L.S., a person under eighteen (18) years of age, 610 P.2d 1294 (Utah 1980), the court in interpreting similar language in Section 76-5-404 (1), determined that when conduct set forth in general terms is connected with specific conduct prescribed by the statute by the disjunctive "or" it is indicative of an intent to make the type of conduct referred to by the general term of equal gravity with that conduct referred to in the more specific terms. Hence, constructive possession of a firearm, much less simply being in the presence of a firearm without knowledge of its existence, does not arise to the level of conduct equated with using, threatening or attempting to use a dangerous weapon while committing or fleeing from a burglary. If constructive possession of a firearm is sufficient to create an aggravating circumstance which elevates burglary to aggravated burglary, then any burglar who owns or possesses a

firearm, but leaving it at his home, is guilty of aggravated burglary when he travels to a distant location and burglarizes someone's property. Defendant Lemon is entitled to the Court's consideration of an additional argument to that of Defendant Seel. At the end of the State's case, when the Court was considering various motions of defense counsel for dismissal or reduction of Count I-IV, and Count V, and the counter arguments of the prosecutor, the Court erroneously decided that the accomplice statute, Section 76-2-202, U.C.A., (1953), as amended, sufficiently covered Mr. Lemon's activities to allow the jury to consider whether Mr. Lemon was guilty of aggravated burglary, not withstanding the Court's conclusion that there was no evidence to show that Mr. Lemon had any knowledge of the existence of the firearm in the vehicle, (T. 161, Line 8-11), and concluded that the accomplice statute did not apply to Mr. Lemon on Count V because of his lack of knowledge. However, the accomplice statute, Section 76-2-202, requires the very mental state that the Court found lacking in Mr. Lemon when it dismissed Count V. If the mental state required to commit the offense of aggravated burglary does not exist because there is no evidence to show that Defendant Lemon even knew the firearm was present in the vehicle, he cannot be held accountable for what Defendant Seel may have known. The Court correctly applied the standard for the accomplice statute on Count V (T. 160, Line 13-20), but incorrectly applied it as to Defendant Lemon on Counts I-IV.

The Court erred when it failed to grant defense counsel's motion at the end of the presentation of the State's case and should have reduced Counts I-IV from Aggravated Burglary to Burglary of a Non-Dwelling.

FIFTH ISSUE: Defendant claims that prosecutorial misconduct prejudiced his right to a fair trial because the prosecutor misrepresented the evidence in his closing arguments to the jury, thereby improperly influencing the jury, (see Discussion of Prosecutorial Misconduct in Detail of the Argument, Second Issue). For prosecutorial misconduct to be reversible error, Defendant must show that there is " a reasonable likelihood that in its absence, there would have been a more favorable result" State v. Tillman, 750 P.2d 546, 551, (Utah 1987). An isolated misconduct, by itself, is not sufficient to sustain reversible error, either. Only with repeated or extensive improper comments, will the Court find prosecutorial misconduct that warrants reversal. State v. Lairby, 699 P.2d 1181, 1206 (Utah 1984).

During closing arguments in this case, the prosecutor for the State misstated facts and testimony several times, presented facts and opinions not in evidence, and reminded the jury of the claim that these Defendants possessed burglary tools even though the Court had ruled that no evidence had been presented to justify the assertion that the tools found in Defendant's possession were burglary tools. The prosecutor used the argument that the

Defendants possessed burglary tools to contradict Defendant/Appellant's defense and to claim that Co-Defendant Seel was lying when he testified. When reference is made to tools as "burglary tools" in a case where the defendant is charged with "burglary", the implication that defendant possessed tools peculiarly suited for use in committing burglaries has a strong impact on the minds of the jurors and is likely to convince them that a person who possesses "burglary tools" also is likely to commit burglaries.

Because there were repeated and extensive improper comments by the prosecutor, and because there is a reasonable likelihood that in the absence of those comments Defendant may have obtained a more favorable result, the misconduct by the prosecutor should be found to be reversible error.

Normally, when the defendant fails to object, he waives his right to raise such issues on appeal. However, when the errors are plain and made to appear "on the face of the record and to the manifest prejudice of the accused . . .", State v. Jobo, supra, the Court may consider that issue. When prosecutorial misconduct is also the duty of the court to stop the proceedings, instruct the prosecutor to discontinue the conduct and admonish the jury concerning the matter. While neither the defense counsel nor the judge interfered with the actions of the prosecutor, their failure to act should not "be the cause of one's going to

prison", State v. Bullock, supra.

SIXTH ISSUE: In the process of introducing Exhibits 11-19, the State failed to introduce evidence or opinion testimony sufficient to justify introduction and admission of those exhibits as burglary tools. Although the State's witness repeatedly made comments that the various exhibits could be used 'as a burglary tool", (T. 103-106), the State failed to lay a proper foundation for the proper introduction of those exhibits.

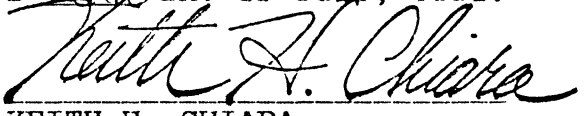
Over defense counsel's objections, however, the Court admitted those exhibits into evidence and subsequent to those exhibits being received into evidence, they were placed before the jury for the jury to observe and view. They were referred to throughout the course of the trial as "burglary tools" and the obvious implication is that a person in possession of "burglary tools" is very likely to be a person who commits burglaries. After the State rested, the Court, upon its own motion, ruled that no evidence had been introduced to support a claim that those tools were burglary tools under the meaning of Section 76-6-205, U.C.A., (1953), as amended. Since the Court concluded on its own that the State had not presented any evidence to support Count VI, it was manifest error for the Court to admit Exhibits 11-19. When the Court initially admitted those tools into evidence as being "burglary tools", the jury was prejudiced in hearing the evidence, seeing the evidence admitted as being proof of possessing "burglary tools" and having those tools

placed within the view of the jury. Because there is a reasonable likelihood that the Defendant may have obtained a more favorable result in the absence of the introduction of those items into evidence, their introduction is reversible error.

CONCLUSION

Defendant is entitled to have his convictions herein reversed and the entire case returned to the District Court for further proceedings. Additionally, if the Court concludes that there is insufficient evidence on the record to support Defendant's claim that he was denied effective assistance of counsel, the Court may remand the matter to the District Court for an evidentiary hearing on that issue. After the District Court has taken testimony in evidence on that issue, if the District Court does not rule that Defendant was denied effective assistance of counsel, the record should contain enough information for Defendant to appeal the District Court's decision on that issue.

RESPECTFULLY SUBMITTED, THIS 23rd DAY OF JULY, 1991.



KEITH H. CHIARA
Counsel for Defendant/Appellant

CERTIFICATE OF DELIVERY

The undersigned hereby certifies that he, on July 23rd 1991, personally delivered the original and eight (8) copies of the foregoing APPELLANT'S BRIEF, to:

Utah Supreme Court
332 State Capitol
Salt Lake City, UT 84114

and that on said date, he likewise delivered four (4) copies thereof to:

Office of the Attorney General
Room 236
Utah State Capitol
Salt Lake City, UT 84114

Dated this 23rd day of July, 1991.

Keith H. Christie

APPENDIX

ALLEN S. THORPE #3254
Emery County Public Defender
98 East Main Street
P.O. Box 1238
Castle Dale, UT 84513
(801)381-5110

Attorney for the Defendant

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR EMERY COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. MICHAEL DUANE SEEL and GLENN LEMON, Defendant.	AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION TO VACATE TRIAL Criminal No. 89 CR 2303

STATE OF UTAH)
: ss.
County of Emery)

Allen S. Thorpe, being first duly sworn upon his oath to testify truthfully, now, hereby deposes as follows:

1. That he is the Emery County Public Defender and counsel of record for the Defendant herein, having been appointed on September 6, 1989.

2. That jury trial herein had previously been set for September 26, 1989, and your affiant, at the time of his appointment felt that there would be adequate time to prepare for such trial, based upon the information known to him at that time.

3. That your affiant was required to prepare for two jury trials in other cases prior to the trial date set in this case.

4. That, on or about September 20, 1989, your affiant met with the Defendants at the Emery County Detention Center and learned for the first time that they desired to claim in part a defense of alibi, and was given the names of numerous witnesses

they desire to call in their defense.

5. That, your affiant is unable, in the short time before trial to locate, interview and evaluate the testimony of the witnesses named by the Defendants.

6. That, your affiant is further unable to give notice to the State as required by Section 77-14-2 U.C.A. (1953), as amended, because of the short notice he himself received of the existence of the aforesaid witnesses.

7. That, when first informed of the existence of said witnesses, your affiant asked the Defendants why there was nothing about them in their case file, to which they replied that their previous counsel had never asked them about potential witnesses or explained the necessity of giving such notice, wherefore, your affiant verily believes that this information was not withheld in bad faith or for the purpose of delay.

Dated this ____ day of September, 1989.

Allen S. Thorpe
Emery County Public Defender

Signed and sworn to before me this ____ day of September, 1989.

Notary Public

ALLEN S. THORPE #3254
Emery County Public Defender
98 East Main Street
P.O. Box 1238
Castle Dale, UT 84513
(801)381-5110

Attorney for the Defendants

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR EMERY COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. MICHAEL DUANE SEEL and GLENN LEMON, Defendant.	MOTION TO VACATE TRIAL Criminal No. 89 CR 2303

COME NOW THE DEFENDANTS, by and through their counsel of record, Allen S. Thorpe, and move this Court to vacate the Jury Trial set for September 25, 1989 on the grounds that their counsel, having been recently appointed, will be unable to adequately prepare for trial. This motion is suported by the Affidavit of Defendants' Counsel.

DATED this 22nd day of September, 1989.

Allen S. Thorpe
Emery County Public Defender

SEVENTH JUDICIAL DISTRICT COURT
EMERY COUNTY, STATE OF UTAH

HONORABLE BOYD BUNNELL, JUDGE
John Greenig, Court Reporter

July 6, 1989 - 10:00 a.m.
Criminal No. 934

TITLE:	ATTORNEY(S):
STATE OF UTAH, Plaintiff,	Scott N. Johansen
v.	
DARRELL RAYMOND HEDDING, Defendant.	Allen S. Thorpe

MINUTE ENTRY

Proceedings Before the Court: Arraignment

This matter came before the Court for Arraignment. The State was represented by County Attorney, Scott N. Johansen. The defendant was present together with Attorney, Allen S. Thorpe. To the information, the defendant entered a plea of "NOT GUILTY" to all counts. This matter is set for Trial to a Jury on Thursday, September 7,1989, at 9:30 a.m. for two days. Defense counsel made a motion for reduction of bail to $2,000. Court denied the motion and fixed bail at $5,000.

BRUCE C. FUNK, CLERK
BY: J. WINN, DEPUTY CLERK

BOYD BUNNELL, DISTRICT JUDGE

SEVENTH JUDICIAL DISTRICT COURT
EMERY COUNTY, STATE OF UTAH

HONORABLE BOYD BUNNELL, JUDGE
John Greenig, Court Reporter

September 7, 1989 - 10:00 a.m.
Criminal No. 934

TITLE:

ATTORNEY(S):

STATE OF UTAH,
Plaintiff,

Scott N. Johansen

v.

DARRELL RAYMOND HEDDING,
Defendant.

Allen S. Thorpe

MINUTE ENTRY

Proceedings Before the Court: Jury Trial

This was the date and hour fixed for Trial in this matter. The State was represented by County Attorney, Scott N. Johansen. The defendant was present together with Attorney, Allen S. Thorpe.

A jury panel was duly notified and present in Court. Sixteen jurors were selected and sworn on voir dire. The Court excused William Luce and Wallace R. Curtis for cause. Two more jurors were selected and sworn on voir dire.

Counsel made their pre-emptory challenges and the following jurors were selected to serve as trial jurors: Christel Farabee, Sue Jones, Colleen Jorgensen, Elnora K. Jensen, Kathryn Jones, Sonja Bassett, Lynda Baker and Cynthia Collete.

The jurors were administered the oath to try the case. The information was read and the plea of the defendant stated.

The Court admonished the jury as to proper conduct and Court recessed at 10:20 a.m. and reconvened at 10:30 a.m. with all parties present.

Counsel informed the Court that the defendant would like to change his plea.

To Counts I and II of the information, the defendant entered a plea of "GUILTY". The Court determined that the defendant was fully aware of his legal and constitutional rights and having waived those rights, the plea of Guilty was entered. On motion of the State and good cause appearing therefore, the Court orders Counts III and IV dismissed.

This matter is referred to State Corrections for a presentence investigation and report and is continued to Tuesday, October 3, 1989, at 9:30 a.m. for pronouncement of judgment. The Court will continue the present bail arrangements.

BRUCE C. FUNK, CLERK
BY: J. WINN, DEPUTY CLERK

BOYD BUNNELL, DISTRICT JUDGE

Scott Johansen #1703
Emery County Attorney
P. O. Box 1099
Castle Dale, Utah 84513
Telephone: (801) 381-2543

IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR EMERY COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. WILLIAM LESLIE ROLLINS DOB 09/17/50 Defendant.	JUDGMENT AND COMMITMENT TO STATE PRISON Criminal No. 937

The above-named Defendant appeared on September 19, 1989, for a jury trial in the above matter, together with his attorney, Allen S. Thorpe, and having been found Guilty as follows: Count I, Theft, a Second-Degree Felony; Count II, Burglary of a Vehicle, a Class A Misdemeanor; Count III, Unlawful Possession of a Dangerous Weapon, a Third-Degree Felony; Count IV, No Valid Operator's License, a Class B Misdemeanor; and Count V, Open Container of Alcoholic Beverage in a Vehicle, a Class B Misdemeanor, and having advised the Court that he had no legal reason to state why judgment should not be pronounced, and the Court being fully advised in the premises;

IT IS THE JUDGMENT AND SENTENCE OF THE COURT that the said WILLIAM LESLIE ROLLINS, on Count I serve a term in the Utah State

Prison of NOT LESS THAN ONE (1) YEAR, NOR MORE THAN FIFTEEN (15) YEARS; on Count II, serve a term in the Emery County Detention Center of one (1) year; on Count III, serve a term in the Utah State Prison of NOT TO EXCEED (5) YEARS; on Count IV, serve a term in the Emery County Detention Center of thirty (30) days; and on Count V, serve a term in the Emery County Detention Center of six (6) months. Said terms of incarceration are to run concurrently, with credit given for time served since June 16, 1989.

You, the said WILLIAM LESLIE ROLLINS, are hereby rendered into the custody of the Sheriff of Emery County, State of Utah, to be by him delivered into the custody of the Warden or other proper officer of said State Prison.

DATED this 26th day of September, 1989.

BOYD BUNNELL
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on the 26th day of September, 1989, I mailed a true and correct unexecuted copy of the foregoing Judgment by depositing same in the U.S. Mail, postage prepaid, addressed to Defendant's attorney as follows:

Allen S. Thorpe
Attorney at Law
P. O. Box 1238
Castle Dale, Utah 84513

Secretary